

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term 2005

6
7 (Submitted: January 19, 2006

Decided: August 3, 2006)

8
9 Docket Nos. 04-2896-pr(L); 04-2901-pr(CON)

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12
13 WILLIAM PABON,

14
15 Plaintiff-Appellant,

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17 FELIX MANUEL RUIZ a/k/a PEDRO RUIZ,¹

18
19 Plaintiff,

20
21 -- v. --

22
23 DR. LESTER WRIGHT, DR. NORMAN SELWIN, DR. CHARLES
24 BENDHEIM, DR. VINCENT MARRONE, DR. HARRY MAMIS, DR.
25 ANDREW MILLER, DR. CHARLES RUSH, DR. BHARAT DASANI,
26 DR. RAVI HOTCHANDANI, DR. ROBERT ROSENZWEIG, DR.
27 KOENIGSMANN, DR. CHAKARVORTY, DR. PHILLIP MARRONE,
28 JACQUELEINE A. BODZAK, and CATHERINE METZLER,

29
30 Defendants-Appellees.²

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32 -----x
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34 B e f o r e : WALKER, Chief Judge, NEWMAN and KATZMANN, Circuit
35 Judges.

1 ¹ After we dismissed Plaintiffs-Appellants' appeal for
2 failure to comply with a scheduling order, Pabon, but not Ruiz,
3 sought and obtained reinstatement of his appeal. Ruiz is
4 therefore no longer a party to this action.

1 ² This caption varies from the official caption, which is
2 incorrect in certain respects. The Clerk of the Court is
3 directed to amend the official caption accordingly.

1 Appeal from a decision of the United States District Court
2 for the Southern District of New York (William H. Pauley III,
3 Judge) granting Defendants-Appellees' motion for summary judgment
4 as to incarcerated pro se Plaintiff's 42 U.S.C. § 1983 claims
5 premised on his contention that his physicians' actions in (1)
6 requiring him to undergo a liver biopsy as a precondition to
7 treatment for Hepatitis C and (2) failing to inform him of the
8 risks and side effects associated with Interferon treatment
9 violated his Eighth and Fourteenth Amendment rights.

10 AFFIRMED.

11 WILLIAM PABON, pro se, Stormville, New
12 York.

13
14 DAVID LAWRENCE III, Assistant Solicitor
15 General (Eliot Spitzer, Attorney General
16 of the State of New York, Michael S.
17 Belohlavek, Senior Counsel, on the
18 brief), New York, New York, for State
19 Defendants-Appellees.

20
21 NANCY A. BRESLOW, Martin Clearwater &
22 Bell LLP (John L.A. Lyddane, on the
23 brief), New York, New York, for Private
24 Defendants-Appellees.

25
26 JOHN M. WALKER, JR., Chief Judge:

27 William Pabon, an inmate at Green Haven Correctional
28 Facility ("Green Haven"), was diagnosed with Hepatitis C. Under
29 the care of physicians both at Green Haven and at a private
30 clinic, he underwent a liver biopsy to verify the diagnosis and
31 then was treated with both Interferon and Ribavirin. Pabon
32 complains that his Hepatitis treatment was conditioned on his

1 submission to a liver biopsy and that the Interferon treatment
2 resulted in serious side effects about which he was not warned.
3 He further claims that, had he known of the side effects
4 associated with liver biopsies and Interferon, he would have
5 refused treatment. Pabon contends that these facts amount to a
6 violation of a Fourteenth Amendment right to medical information.

7 For the reasons that follow, we hold that Pabon is correct
8 that the Fourteenth Amendment's recognized liberty interest in an
9 individual's right to refuse medical treatment carries with it a
10 concomitant right to such information as a reasonable patient
11 would deem necessary to make an informed decision regarding
12 medical treatment. To establish a violation of this right, a
13 prisoner must show that (1) government officials failed to
14 provide him with such information; (2) this failure caused him to
15 undergo medical treatment that he would have refused had he been
16 so informed; and (3) the officials' failure was undertaken with
17 deliberate indifference to the prisoner's right to refuse medical
18 treatment. We also recognize, however, that prison officials may
19 administer treatment to an inmate despite that inmate's desire to
20 refuse treatment if, in the exercise of their professional
21 judgment, the officials reasonably determine that providing such
22 treatment furthers a legitimate penological interest. Because
23 this right was not clearly established in this circuit when Pabon
24 was diagnosed with and treated for Hepatitis C, we affirm the

1 district court's grant of summary judgment to all Defendants on
2 qualified-immunity grounds.

3 **BACKGROUND**

4 In October 1996, a laboratory test indicated that Pabon may
5 have contracted Hepatitis C, a chronic viral liver disease that
6 can increase the risk of liver cancer and can lead to
7 inflammation, scarring, and cirrhosis of the liver. Cirrhosis
8 ultimately can lead to liver failure and death.

9 The physicians at Green Haven referred Pabon to Dutchess
10 Gastroenterologists, P.C. ("Dutchess") for additional testing.
11 In May 1997, a doctor at Dutchess saw Pabon and, according to
12 Defendants, recommended that Pabon undergo additional testing to
13 confirm the preliminary Hepatitis C diagnosis. Pabon contends
14 that he was forced to undergo these tests. In any event, the
15 additional tests were performed, and they confirmed the initial
16 diagnosis.

17 Pabon returned to Dutchess in July 1997 for further
18 evaluation. Defendants maintain that, at that time, the doctors
19 at Dutchess provided Pabon with information about Hepatitis C and
20 Interferon, a medication used for the treatment of Hepatitis C,
21 and discussed with Pabon the need for a liver biopsy. They also
22 maintain that the prevailing standard of care in treating
23 Hepatitis C includes performing a liver biopsy to assess the
24 state of a patient's liver before prescribing Interferon.

1 According to Pabon, he was told that he must undergo a liver
2 biopsy in order to receive treatment for his condition but was
3 never informed of the possible complications or risks associated
4 with liver biopsies. He maintains that the prevailing standard
5 of care does not call for a biopsy and that had his treatment not
6 been made contingent on undergoing the biopsy, he would have
7 refused to submit to that procedure.

8 In October 1997, the liver biopsy was performed, and the
9 following month, Dr. Bharat Dasani evaluated Pabon and prescribed
10 Interferon. While Dr. Dasani does not recall a specific
11 conversation with Pabon about Interferon's side effects, he
12 claims that it is his custom and practice to have such a
13 conversation with all patients being treated with Interferon.
14 Pabon contends that he was never informed of Interferon's
15 possible side effects.

16 Pabon began Interferon treatment in November 1997. Because
17 his response to the Interferon therapy was incomplete as of
18 October 1998, Dr. Thomas Rush, the consulting infectious-disease
19 specialist at Green Haven, recommended the addition of Ribavirin,
20 also used to treat Hepatitis C, to Pabon's treatment. Pabon
21 claims that Dr. Rush failed to inform him of the possible side
22 effects of Ribavirin treatment.

23 Pabon complained of gastric pain soon after his Interferon
24 treatment began. As a result, he was examined at Dutchess on two

1 occasions where Dr. Dasani recommended that Pabon take Zantac
2 along with his Interferon. Pabon also maintains that he
3 experienced numerous additional side effects of the biopsy and
4 the Interferon/Ribavirin treatment, including dizziness,
5 vomiting, abdominal pain, severe headaches, chronic depression,
6 pain, suicidal thoughts, and impotence, and that these adverse
7 effects led to marital problems.

8 By late 1999, Pabon exhibited a complete response to
9 Hepatitis C therapy and the medications were discontinued. Since
10 that time, Pabon's liver enzymes have remained normal, and his
11 Hepatitis C viral load is undetectable. According to Pabon's
12 doctors, this sustained response is the best outcome that could
13 have been expected.

14 Despite this successful result, Pabon brought this § 1983
15 suit seeking damages for violations of his rights under the
16 United States Constitution. The complaint names two groups of
17 defendants: Pabon's doctors at Dutchess and his doctors and
18 nurses at Green Haven. The district court construed Pabon's
19 complaint to implicate only his Eighth Amendment rights and,
20 finding no evidence of deliberate indifference, granted
21 Defendants' summary judgment motion. This timely appeal
22 followed.

23 DISCUSSION

1 We review a district court's grant of summary judgment de
2 novo. Anderson v. Recore, 446 F.3d 324, 328 (2d Cir. 2006).

3 Summary judgment is appropriate where, construing all evidence in
4 the light most favorable to the non-moving party, id., "there is
5 no genuine issue as to any material fact and . . . the moving
6 party is entitled to a judgment as a matter of law," Fed. R. Civ.
7 P. 56(c).

8 **I. Issues on Appeal**

9 The district court considered only whether Pabon had
10 submitted evidence sufficient to show a disputed issue of
11 material fact with respect to an Eighth Amendment violation. To
12 make out such a violation, an inmate must show that state
13 officials acted with deliberate indifference to his serious
14 medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
15 Defendants do not dispute that Hepatitis C qualifies as a serious
16 medical condition, but the district court found that Pabon had
17 failed to put forth evidence that Defendants acted with
18 deliberate indifference and therefore granted their summary
19 judgment motion.

20 On appeal, Pabon fails to challenge this determination.
21 Because Pabon's brief to this court does not contend that the
22 district court erred in dismissing his Eighth Amendment claim, we
23 consider that claim abandoned. Cruz v. Gomez, 202 F.3d 593, 596
24 n.3 (2d Cir. 2000) ("When a litigant—including a pro se

1 litigant—raises an issue before the district court but does not
2 raise it on appeal, the issue is abandoned.”). We therefore will
3 not review the dismissal of Pabon’s Eighth Amendment claim.

4 Pabon’s complaint also indicated that at least some of his
5 claims arose under the Fourteenth Amendment. According to the
6 district court, the Fourteenth Amendment is relevant to Pabon’s
7 claim only insofar as it makes the Eighth Amendment’s ban on
8 cruel and unusual punishment applicable to the states, and
9 Defendants agree with this analysis. Pabon asserts that he
10 raised a Fourteenth Amendment due process claim independent of
11 the Eighth Amendment.

12 We construe complaints filed by pro se litigants liberally
13 and “interpret them to raise the strongest arguments that they
14 suggest.” Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994).
15 Pabon’s appellate brief is wholly devoted to the argument, new to
16 this court, that Defendants’ alleged failure to inform him of the
17 side effects of Interferon treatment and refusing to provide
18 treatment pending a liver biopsy constitute violations of his
19 Fourteenth Amendment substantive due process right to refuse
20 medical treatment. Because this argument is based on facts that
21 are alleged in Pabon’s complaint, we conclude that Pabon did
22 raise an independent Fourteenth Amendment claim in his complaint.
23 The viability of the Fourteenth Amendment claim is thus the issue
24 before us on appeal.

II. Qualified Immunity

Even if Pabon's complaint states a Fourteenth Amendment claim, we must consider whether Defendants are entitled to summary judgment on qualified-immunity grounds. Determining this question is a two-step process. First, we must consider whether, viewed in the light most favorable to Pabon, "the facts alleged show the [official's] conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001) (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)). At this stage of the inquiry, courts holding that a previously unrecognized constitutional right exists must define its contours. Through this process, courts "set forth principles which will become the basis for a holding that a right is clearly established" in subsequent cases. Id. at 201.

If the facts as alleged would not amount to the violation of a constitutional right, the qualified-immunity inquiry is at an end, and summary judgment must be granted. Id. "On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." Id. According to this second inquiry, a qualified-immunity defense will be successful either when the defendants' actions did not violate clearly established law or when it was objectively reasonable for the

1 defendants to believe that their actions did not violate such
2 law. Poe v. Leonard, 282 F.3d 123, 133 (2d Cir. 2002).

3 Applying these principles here, we first must determine
4 whether Pabon has successfully alleged a violation of a right
5 under the Fourteenth Amendment. If so, we then must decide
6 whether summary judgment is nonetheless appropriate because the
7 infringed-upon right was not clearly established at the time of
8 the violation or because it was reasonable for Defendants to
9 believe that they were not violating Pabon's rights.

10 **A. The Violation of a Constitutional Right**

11 Determining whether Pabon's complaint describes the
12 violation of a constitutional right requires us to consider
13 whether the Fourteenth Amendment includes a substantive due
14 process right to information regarding proposed medical treatment
15 and, if so, to delineate the scope of that right.

16 **1. The Right to Medical Information**

17 While the contours of prisoners' rights will depend upon the
18 requirements of prison administration and prison life, the
19 Supreme Court has told us that inmates do not abandon their
20 constitutional rights at the prison door. E.g., Turner v.
21 Safley, 482 U.S. 78, 84 (1987) (prisoners retain the right to
22 petition the government for the redress of grievances, the right
23 to protection against invidious racial discrimination, and the
24 right to due process). And as the Supreme Court stated in Cruzan

1 v. Director, Missouri Department of Health, a "person has a
2 constitutionally protected liberty interest in refusing unwanted
3 medical treatment." 497 U.S. 261, 278 (1990); see also
4 Washington v. Harper, 494 U.S. 210, 221 (1990) (recognizing a
5 prisoner's "significant liberty interest in avoiding the unwanted
6 administration of antipsychotic drugs").

7 While decisions regarding medical treatment are normally
8 private matters to be resolved between an individual and his or
9 her physician, when these decisions occur in the prison setting,
10 the government has a role. The state is obligated to provide
11 medical care to those that it has incarcerated and thus made
12 dependent on the care and services that it provides. Estelle,
13 429 U.S. at 103. As a result, these decisions usually involve
14 state action. Because § 1983 liability attaches only when the
15 constitutional deprivation is the result of state action, the
16 following discussion applies only to doctors or other prison
17 officials that are acting under color of state law. See 42
18 U.S.C. § 1983; see also Flagg Bros., Inc. v. Brooks, 436 U.S.
19 149, 156 (1978) (recognizing liability under § 1983 for private
20 individuals who cause a deprivation of a constitutional right
21 when acting under color of state law).

22 In White v. Napoleon, 897 F.2d 103 (3d Cir. 1990), the Third
23 Circuit upheld a prisoner's claim that a prison doctor's refusal
24 to answer his questions about prescribed medication violated the

1 prisoner's Fourteenth Amendment rights. The court first
2 recognized that prisoners, like nonincarcerated citizens, have a
3 right to refuse medical treatment. Id. at 111. It then reasoned
4 that the right to refuse that treatment has little meaning
5 without sufficient knowledge of what the treatment entails. Id.
6 at 113. Consequently, it held that "[p]risoners have a right to
7 such information as is reasonably necessary to make an informed
8 decision to accept or reject proposed treatment," id., as well as
9 a reasonable explanation of the viable alternative treatments
10 available to them in the prison setting, id.; see also Benson v.
11 Terhune, 304 F.3d 874, 884-85 (9th Cir. 2002) (noting the Third
12 Circuit's recognition of the right to medical information and
13 describing it as a "reasonable application of Supreme Court
14 precedent"); Clarkson v. Coughlin, 898 F. Supp. 1019, 1049
15 (S.D.N.Y. 1995) (holding that the "failure to provide such
16 information as is sufficient to informed consent in a manner
17 permitting the inmate/plaintiff to make a knowledgeable
18 evaluation" of his options is a violation of the inmate's due
19 process rights to be free from unwanted medical treatment).

20 We agree with the Third Circuit that an individual cannot
21 exercise his established right to refuse medical treatment in a
22 meaningful and intelligent fashion unless he has sufficient
23 information about proposed treatment. Absent knowledge of the
24 risks or consequences that a particular treatment entails, a

1 reasoned decision about whether to accept or reject that
2 treatment is not possible. We therefore hold that, in order to
3 permit prisoners to exercise their right to refuse unwanted
4 treatment, there exists a liberty interest in receiving such
5 information as a reasonable patient would require in order to
6 make an informed decision as to whether to accept or reject
7 proposed medical treatment. See White, 897 F.2d at 113
8 ("Prisoners have a right to such information as is reasonably
9 necessary to make an informed decision to accept or reject
10 proposed treatment").

11 The entitlement to this information, however, is far from
12 absolute. To establish a violation of the constitutional right
13 to medical information, a prisoner must satisfy an objective
14 reasonableness standard, must demonstrate that the defendant
15 acted with the requisite state of mind, and must make a showing
16 that the lack of information impaired his right to refuse
17 treatment.

18 **i. Objective Standard**

19 The right to medical information has an objective component.
20 The prisoner is entitled only to such information as a reasonable
21 patient would deem necessary to make an informed decision. This
22 objective requirement limits the scope of the right in at least
23 three ways. First, it precludes liability in cases where a
24 prisoner may not have received all conceivable information

1 regarding a particular treatment but a reasonable person would
2 not find the missing information necessary to a decision
3 regarding whether to go forward with that treatment. Second, it
4 recognizes that prisoners' requests for information "may range
5 from reasonable to obstructionist." White, 897 F.2d at 113.
6 Prisoners may not interfere with a prison's ability to provide
7 medical attention to its inmates in an orderly, efficient manner
8 by demanding unnecessary information during physician visits.
9 Finally, it is not unlikely that, after receiving appropriate
10 treatment that proved to have unpleasant side effects, a prisoner
11 might claim that he had not received sufficient information to
12 allow him to decide whether to refuse that treatment. To avoid
13 liability in such situations, a doctor should not be required to
14 provide each prisoner-patient with an exhaustive list of all the
15 possible adverse effects of each aspect of his treatment.
16 Instead, a doctor simply must provide a prisoner with such
17 information as a reasonable patient would find necessary to
18 making an informed decision regarding treatment options.

19 **ii. Defendants' State of Mind**

20 Inadvertent failures to impart medical information cannot
21 form the basis of a constitutional violation. The simple lack of
22 due care does not make out a violation of either the substantive
23 or procedural aspects of the Due Process Clause of the Fourteenth
24 Amendment. Davidson v. Cannon, 474 U.S. 344, 348 (1986);

1 Daniels v. Williams, 474 U.S. 327, 332 (1986). In County of
2 Sacramento v. Lewis, 523 U.S. 833 (1998), the Supreme Court
3 considered what sort of executive action could qualify as a
4 substantive due process violation. In that case, the parents of
5 a motorcycle passenger killed in a high-speed police chase
6 brought a § 1983 claim alleging deprivation of their son's
7 substantive due process right to life. Id. at 837. The Court
8 began its analysis by reiterating that "the touchstone of due
9 process is protection of the individual against arbitrary action
10 of government.'" Id. at 845 (quoting Wolff v. McDonnell, 418
11 U.S. 539, 558 (1974)) (alteration marks omitted). In the context
12 of executive action, this means that the Due Process Clause is
13 offended only if the government's abuse of power "shocks the
14 conscience." Id. at 846; see also id. at 847 n.8 (1998) ("[T]he
15 threshold question is whether the behavior of the governmental
16 officer is so egregious, so outrageous, that it may fairly be
17 said to shock the contemporary conscience.").

18 In determining that injuries caused by high-speed chases do
19 not give rise to Fourteenth Amendment liability unless the
20 officers intend to harm the injured party, County of Sacramento
21 recognized that the requisite state of mind for action by an
22 executive official to satisfy the "shocks the conscious" test
23 will vary according to the circumstances. Id. at 849-51.
24 Exigent circumstances, such as when prison officials are faced

1 with a riot or when police encounter a situation calling for an
2 immediate response, require that government actors make instant
3 judgments that honor their competing obligations both to restore
4 order and to act with restraint. In such crises, "even
5 precipitate recklessness fails to inch close enough to harmful
6 purpose to spark the shock that implicates 'the large concerns of
7 the governors and the governed.'" Id. at 853-54 (quoting
8 Daniels, 474 U.S. at 332).

9 By contrast, in situations where actual deliberation is
10 possible, such as in the normal custodial circumstances of a
11 prison, the state's duty to take responsibility for the inmates'
12 safety and well-being "'does not ordinarily clash with other
13 equally important governmental responsibilities.'" Id. at 851-52
14 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). As a
15 result, "forethought about an inmate's welfare is not only
16 feasible but obligatory." Id. at 851.

17 In establishing this dichotomy, County of Sacramento
18 strongly suggests that in those circumstances when actual
19 deliberation is possible, a showing of deliberate indifference
20 will establish Fourteenth Amendment liability. See id. at 850-53
21 ("[L]iability for deliberate indifference to inmate welfare rests
22 upon the luxury enjoyed by prison officials of having time to
23 make unhurried judgments, upon the chance for repeated
24 reflection, largely uncomplicated by the pulls of competing

obligations."). Following the reasoning of County of Sacramento, we hold that in order to incur liability a prison official's failure to adequately inform a patient regarding that patient's proposed medical treatment must be done with, at a minimum, deliberate indifference to the prisoner's right to refuse treatment and that simple negligence will not suffice.

iii. Impairment of the Right to Refuse Treatment

We emphasize that the right to medical information is not, in and of itself, an independent right. Rather, it is a derivative of the right to refuse treatment and extends only to those circumstances in which it will effectuate a patient's exercise of that underlying right. So as a threshold matter, a prisoner must show that, had he received information that was not given to him, he would have exercised his right to refuse the proposed treatment. Cf. Lewis v. Casey, 518 U.S. 343, 351 (1996) (holding that, to state a claim for denial of the right to access the courts, a prisoner must demonstrate that "the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim"). That is to say, a prisoner must be able to establish that the underlying right at stake—the right to refuse treatment—actually was impaired by the state's failure to impart necessary information to the prisoner-patient. If a prisoner still would have accepted the proposed treatment, even if he had been given all of the necessary

1 information regarding that treatment, then his right to refuse
2 treatment has not been impaired, and the deprivation of medical
3 information is of no consequence.

4 **2. Balancing Interests**

5 A determination that a prisoner's right to refuse medical
6 treatment has been impaired does not end the inquiry. A prisoner
7 can establish liability for the violation of a constitutional
8 right only if his individual liberty interest outweighs the
9 relevant countervailing state interests. Turner, 482 U.S. at 89.
10 The prisoner's interest in being provided with information about
11 proposed medical treatment and his right to refuse that treatment
12 must be balanced against the state's interest in effective prison
13 administration. The importance of this state interest is not
14 open to debate, and the Supreme Court has instructed us generally
15 as to where to strike the balance between the state's interest
16 and prisoners' constitutional rights: The state may infringe upon
17 a prisoner's constitutional rights so long as the infringing
18 regulation or policy is "'reasonably related to legitimate
19 penological interests.'" Washington, 494 U.S. at 223 (quoting
20 Turner, 482 U.S. at 89). This standard applies when "determining
21 the validity of a prison regulation claimed to infringe on an
22 inmate's constitutional rights . . . even when the constitutional
23 right claimed to have been infringed is fundamental, and the

1 State under other circumstances would have been required to
2 satisfy a more rigorous standard of review." Id. at 223.

3 Therefore a prisoner's right to refuse medical treatment
4 need not be honored if legitimate penological interests require
5 the prisoner to be treated. If prison officials, including
6 doctors, identify situations in which they reasonably believe
7 that treatment is required, notwithstanding the prisoner's
8 asserted right to refuse it, the right must give way. Obvious
9 examples would be the treatment of an infectious disease,
10 avoidance of contaminations, or prevention of disruption by
11 illness-induced behaviors. On the other hand, one can conceive
12 of instances when legitimate penological interests would not
13 justify interfering with a prisoner's rights to medical
14 information and to refuse treatment, such as end-of-life
15 decisions. Thus, a prison may compel a prisoner to submit to
16 treatment despite his general right to refuse such treatment when
17 prison officials, "in the exercise of professional judgment, deem
18 it necessary to carry out" legitimate penological objectives.
19 White, 897 F.2d at 113.

20 If legitimate penological interests dictate that a
21 particular treatment must be administered even if the prisoner
22 would have refused it, then because there is no constitutional
23 right to refuse treatment, there is no corollary right to be
24 informed about the treatment. The Constitution does not require

1 prison officials to convey information intended to allow the
2 prisoner to exercise a right that is unavailable to him. We
3 leave to prison officials and physicians the determination of
4 what information is appropriately passed along to prisoner-
5 patients in situations where treatment is mandated.

6 **3. The Eighth vs. the Fourteenth Amendment**

7 We turn to Defendants' argument that, because complaints of
8 inadequate medical treatment of prisoners are governed by the
9 Eighth Amendment, Estelle, 429 U.S. at 104, the right to medical
10 information asserted by Pabon could not be found in the
11 Fourteenth Amendment.

12 The Supreme Court has instructed that "[t]he first step in
13 any [§ 1983] claim is to identify the specific constitutional
14 right allegedly infringed." Albright v. Oliver, 510 U.S. 266,
15 271 (1994) (citing Graham v. Connor, 490 U.S. 386, 394 (1989)).
16 If "a particular Amendment 'provides an explicit textual source
17 of constitutional protection' against a particular sort of
18 government behavior, 'that Amendment, not the more generalized
19 notion of "substantive due process," must be the guide for
20 analyzing these claims.'" Id. at 273 (quoting Graham, 490 U.S.
21 at 395).

22 Our view that the right to medical information is grounded
23 in the Fourteenth and not the Eighth Amendment arises from our
24 understanding of the fundamental difference between the rights

1 afforded by each amendment. The Eighth Amendment governs the way
2 in which medical treatment is administered to prisoners because,
3 as the Supreme Court recognized in Estelle, serious medical
4 conditions can result in cruel and unusual punishment if not
5 properly addressed. 429 U.S. at 104. Thus, the protections of
6 the Eighth Amendment reach decisions by prison authorities
7 regarding the manner in which they provide medical care to
8 inmates because improper care may result in the wanton and
9 unnecessary infliction of pain.

10 The Fourteenth Amendment, by contrast, protects the
11 individual's liberty interest in making the decisions that affect
12 his health and bodily integrity. The right to make these
13 decisions, and the corollary right to the information necessary
14 to make them intelligently, is recognized in order to vindicate
15 this fundamental liberty interest in bodily integrity, not to
16 protect against treatment that may amount to cruel and unusual
17 punishment. So rather than concerning itself with prison
18 officials' decisions, it governs individuals' decisions regarding
19 the administration of treatment. These two very different
20 motivations implicate different constitutional protections and
21 justify basing the right to medical information on the Fourteenth
22 Amendment rather than the Eighth.³

1 ³ We recognize that, in rare instances, a failure to impart
2 information to a prisoner regarding his medical treatment might
3 constitute an Eighth Amendment violation. For example, a prison

1 **4. Whether Pabon's Constitutional Rights Were**
2 **Violated**

3
4 Having defined the contours of the Fourteenth Amendment
5 right to medical information, we now turn to whether Pabon has
6 successfully alleged a violation of that right. To the extent
7 Pabon's claim alleges that requiring him to undergo a liver
8 biopsy before considering him eligible for Hepatitis C treatment
9 constituted a violation of his right to refuse medical treatment,
10 we find no constitutional violation. Pabon's doctors concluded
11 that a liver biopsy was a necessary predicate to prescribing
12 Interferon to treat Pabon's Hepatitis C and that prescribing
13 Interferon without performing a prior biopsy was a medically
14 unsound course of action. Pabon remained free to refuse to
15 undergo the biopsy and hence to remain ineligible for Interferon
16 treatment. But he did not exercise that right; instead, because
17 he apparently wanted to avail himself of the benefits of
18 Interferon, he consented to undergo the biopsy. Pabon was
19 therefore not forced to undergo a biopsy. He was simply
20 presented with the option of either consenting to the course of
21 treatment prescribed by his physicians – a biopsy to determine

1 official hypothetically might take advantage of a prisoner's
2 medical condition to inflict pain on that prisoner by
3 recommending a treatment with painful or debilitating side
4 effects without informing the prisoner of those consequences.
5 Such a course of action would implicate the same concerns that
6 have prompted the Supreme Court to apply Eighth Amendment
7 scrutiny to the medical care of prisoners. This case, however,
8 does not present such a scenario.

1 that Interferon was appropriate followed by the Interferon – or
2 to refuse treatment altogether. He chose the former.

3 Pabon's stronger claim is that Defendants violated his
4 constitutional rights by performing a biopsy and administering
5 Interferon without providing him sufficient information so as to
6 be able to make an informed decision regarding whether to accept
7 or refuse such treatment. This allegation implicates Pabon's
8 right to medical information. Pabon has submitted evidence,
9 first, that he was not informed of the risks and side effects
10 associated with either liver biopsies or Interferon/Ribavirin
11 treatment and, second, that had he been aware of those risks and
12 side effects, he would have declined treatment. Finally, Pabon's
13 complaint implies that at least some Defendants acted with the
14 intent to induce Pabon to undergo treatment that he otherwise
15 might have declined. See Second Amend. Compl. ¶ 53 ("Dr. Rush
16 was fully aware of the extremely severe and dangerous side
17 effects of [the prescription drugs administered to Pabon.]
18 Nevertheless, Dr. Rush falsely informed Pabon that there were no
19 side effects . . . with full knowledge . . . that Pabon
20 participated in conjugal visits . . . with his wife."). As a
21 result, we think that the allegations contained in Pabon's
22 complaint successfully make out a violation of his constitutional
23 right to medical information. Despite the allegations in Pabon's
24 complaint, the district court determined that the evidence

1 submitted by Pabon was insufficient to show that Defendants acted
2 with anything more than negligence. Because we find that the
3 right to medical information was not clearly established at the
4 time of Pabon's treatment, see infra, we need not search the
5 record to determine whether Pabon submitted evidence from which a
6 reasonable fact-finder could have inferred that Defendants acted
7 with deliberate indifference or whether the district court's
8 finding of nothing more than negligence was correct.

9 We note here that, because the district court understandably
10 failed to analyze Pabon's claim according to the framework we set
11 forth in this opinion, the record below was not developed with
12 respect to whether legitimate penological interests would permit
13 state officials to insist that a prisoner undergo medical
14 treatment for Hepatitis C over that prisoner's objections.
15 Without the benefit of such a factual record, we express no
16 opinion here as to whether the administration of a liver biopsy
17 or Interferon treatment to prisoners who test positive for
18 Hepatitis C despite the prisoners' desire to forego such
19 treatment would be constitutionally permissible.

20 **B. Whether the Right Was Clearly Established**

21 "[P]ublic officials . . . are protected by qualified
22 immunity from civil liability for actions taken in their official
23 capacity, if those actions were objectively reasonable in light
24 of clearly established rules then extant." Morris-Hayes v. Bd.

1 of Educ., 423 F.3d 153, 158 (2d Cir. 2005). For a right to be
2 clearly established, "[t]he contours of the right must be
3 sufficiently clear that a reasonable official would understand
4 that what he is doing violates that right." Anderson v.
5 Creighton, 483 U.S. 635, 640 (1987).

6 At the time of Pabon's Hepatitis C treatment, it was clearly
7 established that the Fourteenth Amendment confers the right to
8 refuse medical treatment. See Cruzan, 497 U.S. at 278. The
9 concomitant right to medical information was not clearly
10 established, however, because neither this court nor the Supreme
11 Court had recognized such a right at that time. Thus, no
12 official would have been aware that the failure to provide Pabon
13 with such information as a reasonable patient would find
14 necessary to make an informed decision regarding treatment was a
15 violation of his substantive due process rights.

16 We do not agree with Pabon that White, Benson, and Clarkson
17 render this right to medical information clearly established.
18 When neither the Supreme Court nor this court has recognized a
19 right, the law of our sister circuits and the holdings of
20 district courts cannot act to render that right clearly
21 established within the Second Circuit. Anderson v. Recore, 317
22 F.3d 194, 197 (2d Cir. 2003) ("[C]learly established [means that]
23 (1) the law is defined with reasonable clarity, (2) the Supreme
24 Court or the Second Circuit has recognized the right, and (3) 'a

1 reasonable defendant [would] have understood from the existing
2 law that [his] conduct was unlawful.'" (quoting Young v. County
3 of Fulton, 160 F.3d 899, 903 (2d Cir. 1998)). Defendants are
4 therefore entitled to qualified immunity.⁴

5 **CONCLUSION**

6 For the foregoing reasons, we affirm the district court's
7 judgment granting summary judgment to Defendants.

1 ⁴ Because we conclude that all Defendants are entitled to
2 qualified immunity because the right to medical information was
3 not clearly established at the time of Pabon's diagnosis and
4 treatment, we need not address the argument of some Defendants
5 that they are not liable because they are not state actors.